United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

Docket No. 74-1977
Docket No. 74-2092

IN THE

United States Court of Appeals

For the Second Circuit

SELENE WEISE,

Appellant,

—*v*—

SYRACUSE UNIVERSITY, et al.,

Appellees.

JO DAVIS MORTENSON,

Appellant,

—*v*—

SYRACUSE UNIVERSITY, et al.,

Appellees.

On Appeal from the United States District Court
Northern District of New York

PETITION FOR REHEARING,
Syracuse University, et al.

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United States Court of Appeals

For the Second Circuit

NOS. 372, 383 - September Term, 1974
Docket Nos. 74-1977, 74-2092

SELENE WEISE,

Appellant,

vs.

SYRACUSE UNIVERSITY, ET AL.,

Appellees.

JO DAVIS MORTENSON,

Appellant,

vs.

SYRACUSE UNIVERSITY, ET AL.,

Appellees.

PETITION FOR REHEARING

Syracuse University, et al., Appellees, petition for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure with respect to that part of the Court's decision which reversed and remanded the District Court's dismissal of plaintiffs' claims under 42 U.S.C. section 1985(3).

A. THE DISTRICT COURT'S DISMISSAL OF THE SECTION 1985(3) CLAIMS WAS NOT APPEALED BY EITHER APPELLANTS OR APPELLEES, AND THEREFORE WAS NOT BEFORE THIS COURT FOR AFFIRMANCE OR REVERSAL

1. This Court in its opinion dated July 14, 1975 reversed the dismissal of each plaintiff's claim under 42 U.S.C. section 1985(3) and remanded for further proceedings.

2. In their Civil Appeal Pre-Argument Statement filed in these appeals, Appellants did not list the District Court's dismissal of claims under 42 U.S.C. section 1985(3) as an issue to be raised on these appeals.

3. The questions presented to this Court by Appellants in accordance with Rule 28(a)(2) of the Federal Rules of Appellate Procedure specifically set forth the issues being appealed, and contained no reference to the lower Court's dismissal of the claims under 42 U.S.C. section 1985(3).

4. In the briefs filed with this Court in these cases, Appellants did not brief, refer to, or seek this Court's consideration of the District Court's dismissal under 42 U.S.C. section 1985(3).

5. Rule 28(a)(2) of the Federal Rules of Appellate Procedure has been interpreted to require that all issues to be raised must be set out in appellant's brief; issues not so set out are waived in the absence of exceptional circumstances. United States v. White, 454 F.2d 435 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972). The Court stated:

> This rule is particularly applicable in this case where we have not been presented with sufficient information or argument to allow an intelligent disposition of this issue and for this reason, we treat the issue as having been waived. Id. at 439.

See also Pedicord v. Swenson, 431 F.2d 92 (8th Cir. 1970).

6. In reliance upon Appellants' pre-argument statements and briefs to this Court, the Appellees could only conclude that no appeal had been taken with respect to the dismissal of plaintiffs' claims under section 1985(3), and accordingly Appellees did not brief or argue this issue.

7. The Equal Employment Opportunity Commission as amicus curiae did refer to 42 U.S.C. section 1985(3) in its brief and oral presentation to the Court. However, counsel for Appellees specifically stated to the Court, during oral argument, that this issue was not raised on appeal by the Appellants themselves and since it was not before the Court, it was not his intention to address this issue in oral argument. The attorney for the Appellants minutes earlier had presented his oral argument with no reference whatever to 42 U.S.C. section 1985(3). He heard, and made no objection to, the statement that Appellants had not appealed the lower Court's determination concerning 42 U.S.C. section 1985(3).

8. The issue of Appellants' standing under 42 U.S.C. section 1985(3) was extensively briefed and argued before the District Court. Since Appellants did not appeal this issue, and neither Appellants nor Appellees have addressed it at all in this Court, Appellees have been unjustly prejudiced by reversal of the District Court's judgment on this issue.

B. REVERSAL OF THE DISTRICT COURT'S DISPOSITION OF THE SECTION 1985(3) CLAIMS WAS PARTICULARLY INAPPROPRIATE BECAUSE SEVERAL SUBSTANTIAL QUESTIONS OF LAW ARE INVOLVED, NONE OF WHICH HAS BEEN BRIEFED OR ARGUED BY THE PARTIES IN THESE APPEALS

9. Even though the District Court's disposition of the 1985(3) claims had not been appealed, the opinion states:

> Since the two grounds relied on by the district court for dismissal of the §1985(3) claims were erroneous, we reverse and remand for further consideration of those claims.

The footnote (no. 16) to this statement suggests several unsettled legal questions that might be considered on remand of the 1985(3) issue. We must respectfully insist that where none of the parties has appealed the District Court's disposition of the issue, this Court should not reinstate the issue -- with all its difficult and unsettled legal questions -- by a gratuitous reversal and remand.

10. Moreover, the reversal is not only a gratuitous re-interjection of claims dismissed and unappealed. As to at least one important legal question so re-interjected, the opinion seemingly would establish the law of the case with no opportunity for further consideration by the District Court on remand:

> We have held that it was error to decide the state action issue under §1983 without a hearing, but that is irrelevant to the §1985(3) claims since it is clearly established that §1985(3) embraces a limited

> category of private conspiracies, and that there is no state action requirement. Griffin v. Breckenridge, 403 U.S. 88 (1971). The district court's dismissals of the §1985(3) claims for lack of state action were therefore erroneous.

The Griffin case, cited in the opinion for the proposition that there is no state action requirement under 42 U.S.C. §1985(3), is distinguishable from the cases at hand, and there is a split of authority on this issue in the Circuit Courts of Appeal. Thus it remains a substantial question of law as to whether state action is still required for some types of conspiracies over which the federal courts have jurisdiction under 42 U.S.C. §1985(3). That section of the Civil Rights Act of 1871 was passed pursuant to the power of Congress under Section 5 of the Fourteenth Amendment. Section 5 states:

> The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

The Supreme Court in Collins v. Hardyman, 341 U.S. 651 (1951) interpreted §1985(3) to require action under color of law since private persons could not deprive others of "equal protection" of the law or "equal privileges or immunities under the law" without "some manipulation of the law or its agencies." 341 U.S. at 661. In Griffin the Supreme Court distinguished, but did not expressly overrule, Collins, supra. It held that section 1985(3) could cover purely private conspiracies and that the allegation of state action

was not necessary for all actions brought under the section. It found plaintiffs' allegations of a conspiracy to deprive them of (1) their rights under the Thirteenth Amendment, and (2) their constitutional right of interstate travel -- two basic rights not dependent upon state action -- sufficient to fall within section 1985(3). But the Griffin court left unanswered the question whether state action is still required for other types of conspiracies under §1985(3) stating:

> [T]he allegations of the complaint in this case have not required consideration of the scope of the power of Congress under §5 of the Fourteenth Amendment. Griffin, supra, at 107.

The court did, however, make it clear that section 1985(3) was not intended to be "a general federal tort law":

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.
> Id. at 102.

The Supreme Court did not define the possible parameters of its Griffin ruling, and the decision has received varied judicial construction. In an analysis of the decision, The Supreme Court, 1970 Term, 85 Harvard L. Rev. 95 (1971), the author recognized the constitutional problems faced in applying Griffin to fact situations not considered by the Griffin court and recommended that in cases involving issues

which do not lie under the Thirteenth Amendment and which do not burden interstate travel (the issues considered by the Griffin court), a court is required to consider the limits of Congressional power under Section 5 of the Fourteenth Amendment.

The Seventh Circuit in Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) recognized this requirement and held:

> Although Griffin makes it perfectly clear that some purely private conspiracies among defendants are proscribed by Section 1985(3), Griffin did not purport to delineate the scope of the rights secured by the statute. Id. at 194.

The court further stated:

> Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights. We therefore conclude that an arbitrary business discrimination against lawyers engaged in the practice of criminal law does not deprive plaintiff of 'equal protection of the laws' within the meaning of §1985(3) if there is no state involvement whatsoever in the discrimination. Id. at 196 (emphasis added).

Contra, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).

Standing of the Appellants Weise and Mortenson under Section 1985(3) is not based upon claims cognizable under either the Thirteenth Amendment or their right of interstate travel (the areas reached in Griffin). Consequently, in order to have standing under section 1985(3), the cause

of action must be one that can be protected pursuant to the authority of Section 5 of the Fourteenth Amendment. Defining the scope of legislative power under Section 5 was expressly avoided by the Supreme Court in Griffin, supra, at 107. Since claims under the Fourteenth Amendment must be based upon state action, statutory rights emanating from Section 5 of the Fourteenth Amendment necessarily require state action as well, Dombrowski v. Dowling, supra, and Dreyer v. Jalett, 349 F. Supp. 452 (S.D. Tex. 1972).

This important and controversial question seemingly has been decided by this Court adversely to Appellee's interests without benefit of briefs or arguments and without opportunity for argument on remand, all in connection with reversal of the 1985(3) issue that wasn't appealed in the first place. Whereas the other questions involved in the 1985(3) issue have been re-interjected for further proceedings, this question appears to have been both re-interjected and ultimately decided by this Court.

11. All individually-named defendants are employees of the defendant, Syracuse University, and a question of law (raised before the District Court) exists as to whether actions alleged against them are in effect the single acts of Syracuse University, from which no conspiracy can result. This position was recognized by the Seventh Circuit Court of Appeals in Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) in which the court stated:

> If the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself, will normally not constitute the conspiracy contemplated by this statute. Id. at 196.

See also Baker v. Stuart Broadcasting Co., 505 F.2d 181 (8th Cir. 1974).

12. The existence of the two substantial questions of law outlined here, and of others referred to in footnote 16 of the Court's opinion, makes it particularly burdensome that they be re-introduced into this case despite the Appellants' failure to appeal the District Court's resolution of them. For these reasons the reve sal of the 1985(3) issue in general, and the decision upon the state action requirements of section 1985(3) in particular, seem most inappropriate.

WHEREFORE, it is respectfully urged that this petition for rehearing be granted and that, upon further consideration, the reversal of the judgment of the District Court dismissing plaintiffs' claims under 42 U.S.C. §1985(3) be vacated.

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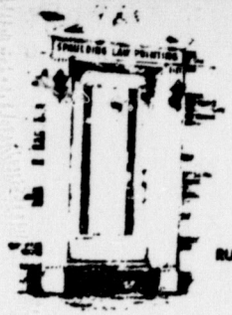

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RE: SELENE WEISE v. SYRACUSE UNIVERSITY, et al. - Docket No. 74-1977
JO DAVIS MORTENSON v. SYRACUSE UNIVERSITY, et al. - Docket No. 74-2092

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of BOND, SCHOENECK & KING, Attorneys for Appellees,

he personally served two (2) copies of the printed Petition for Rehearing of the above-entitled case addressed to:

ELSA DIK GLASS, ESQ.
Attorney at Law
Equal Employment Opportunity Commission
1800 G ST., N.W.
Washington, D.C. 20506

JAMES I. MEYERSON, ESQ.
Attorney at Law
1790 Broadway, 10th Floor
New York, N. Y. 10019

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on July 24, 1975.

Everett J. Rea

Everett J. Rea

Sworn to before me this 24th
day of July , 1975.

Ruth A. McLaughney
Commissioner of Deeds

cc: Bond, Schoeneck & King

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